Supreme Court, U.S.
FILED
MAR 2 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1114

ANTHONY FIOTTO, ROBERT JAMES,
PETER HOMBACH and VINCENZO SACCOCCIO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD E. WALLACH
Attorney for Petitioner
Robert James
253 Broadway
New York, N.Y.
227-0959

HARVEY L. GREENBERG
Attorney for Petitioner
Anthony Fiotto
16 Court Street
Brooklyn, N.Y.
625-6578

HERBERT A. LeGRANGE
Attorney for Petitioners
Peter Hombach & Vincenzo Saccoccic
253 Broadway
New York, N.Y.
227-0959

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Involved	2
The Sentence	3
Reasons for Granting the Writ	4
Conclusion	13

Appendices

Appendix A – Judgment Affirming Conviction	1a
Appendix B – Opinion of Court of Appeals	3a
Appendix C – Constitutional Amendments and Statutes	10a
Appendix D – Judgment of Fiotto	21a
Appendix E – Judgment of Robert James	23a
Appendix F – Judgment of Peter Hombach	25a
Appendix G – Judgment of Vincent Saccoccio	27a

Citations

Bolling v. Sharpe, 347 U.S. 497, 499	5
Downum v. U.S., 372 U.S. 734	13
People v. Oliver, 1 N.Y. (2) 152	3
Richard v. Belcher, 404 U.S. 78	4
Sobell v. U.S., 407 F.2d 180	10
Stalph v. U.S., 367 F.2d 326	11
U.S. v. Stephens, 449 F.2d 103	5

Page

Constitutional Amendments

Amendment [V] 3a
Amendment XIV, Sec. 1 . . . . . 1a

Statutes

21 U.S.C. Secs. 172, 174 (1964) 1
21 U.S.C. 841 2
26 U.S.C. 7237 3
26 U.S.C.A. 176a, 7237(d) 5
526 U.S. 7237(a) 12
35 F.R.C.P. 11

Other Authorities

Congressional Record, Dec. 16, 1979, pp. 39242, 39254 . . 8
House Report No. 91-1444 U.S.C., Cong. and Adm. News, 91st Cong. 1970, pp. 4566, 4570, 4575, 4734 . . . 8,9

SUPREME COURT OF THE UNITED STATES

ANTHONY FIOTTO, ROBERT JAMES,
PETER HOMBACH and VINCENZO SACCOCCIO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners, ANTHONY FIOTTO, ROBERT JAMES, PETER HOMBACH and VINCENZO SACCOCCIO, pray that a writ of certiorari issue to review a Judgment of the United States Court of Appeals, Second Circuit entered January 4, 1972, reprinted herein in Appendix A, *infra*, which affirmed a judgment of conviction rendered against Petitioners in the United States District Court for the Southern District of New York on June 18th, 1971 convicting petitioner Fiotto of knowingly receiving, concealing, and facilitating the transportation of heroin in violation of 21 U.S.C. Sections 172 and 174 (1964) (repealed 1970). All the petitioners were convicted of conspiracy to violate Sections 173 and 174.

OPINION BELOW

The opinion of the said United States Court of Appeals, Second Circuit is reprinted herein in Appendix B, *infra*. This opinion is contained in *United States of America v. Fiotto et al*, not as yet reported.

JURISDICTION

The order and opinion of the United States Court of Appeals is dated January 4th, 1972. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3) and Rule 22. (2) of the Rules of the Supreme Court of the United States.

The Judgment sought to be reviewed is dated and was entered on January 4, 1972.

QUESTION INVOLVED

1. Whether the Petitioners should have been sentenced pursuant to the provisions of 21 U.S.C. 841, instead of pursuant to 26 U.S.C. Section 7237 and 21 U.S.C. 174 both of which were repealed in 1970.

STATEMENT OF THE CASE

The testimony introduced at the trial indicated that in December of 1966 Roberto Largan, a Philippine national, was introduced to one Guillermo Prillo in New York City. Largan asked Prillo if he knew anybody who would be interested in purchasing heroin. Prillo brought Largan's offer to sell to Petitioner James who eventually introduced Prillo to Anthony Fiotto. Prillo, Largan and Petitioners Fiotto and James met and Largan offered to sell a kilo of heroin. Shortly thereafter Largan returned to the Philippines. Prillo met with Petitioners James and Fiotto and placed a call to Largan in the Philippines. Largan stated that he would send someone else with the heroin. In March of 1967 one Benito Lee arrived in New York City with the heroin and contacted Prillo who arranged a meeting with Petitioners Fiotto and James at a restaurant. Petitioner Hombach appeared at the restaurant. The heroin was then given

to Hombach. Some time later Saccoccio returned with the heroin and stated that his buyer did not want it. Several days later James, Prillo and Lee met with Petitioners Fiotto and Hombach in an automobile in New York City. The alleged heroin was given to Petitioner Hombach who returned later with a bag containing $6,000.00.

In the spring of 1967 Largan returned to New York with heroin. He met with Prillo and Petitioners James and Fiotto and offered to sell the heroin. The transaction was completed several days later with Petitioners Fiotto and James giving Largan $7,500.00 for the heroin.

In May of 1968, Mario Sunio arrived in New York with heroin, a sample of which was given to Petitioner James. Fiotto and James met with Sunio. There was no evidence that the transaction was completed.

In 1970 Guillermo Castillo was arrested in Seattle, Washington and heroin was found on his person. Castillo agreed to cooperate with Federal authorities by bringing heroin to Petitioner Fiotto while under surveillance. A meeting was arranged at a coffee shop in New York City and, thereafter, Fiotto was arrested.

The Sentence

The evidence indicates that none of the Petitioners were ever convicted of a crime; that they were all married and had families; that they were all gainfully employed; that this was the first time that any of them had been in any sought of trouble with the law. The evidence indicates that Petitioner James was a veteran of the Air Force; that Hombach was a Korean War veteran; that Saccoccio served in the New York National Guard.

At the sentencing on June 18th, 1971, the attorneys for all four petitioners took the position that the defendants should be sentenced pursuant to the provisions of the new statute 21 U.S.C. 841.

REASONS FOR GRANTING THE WRIT

It is put to this Court that there is a conflict in rulings between the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit in regard to the precise issue involved herein; see U.S. v Stephens, 449 F.(2) 103, (9th Cir., 1971).

In view of the fact that there may be narcotics offenders situated as the petitioners here are situated, it would be to the interest of the government, the other Circuits as well as the petitioners that this Writ be granted.

There is no dispute that the newly enacted Comprehensive Drug Abuse Prevention and Control Act was in effect at the date of sentencing. The issue consequently is whether 21 U.S.C. 174 survived the newly enacted statute and could serve as a basis for the sentencing of the petitioners herein. Specifically, was the Court bound by the mandatory minimum provision of the former statute?

Counsel at the time of the sentencing of petitioners clearly presented the issue to the sentencing Court and also cited the Fifth Amendment guarantee of due process of law; it would seem that due process of law also encompasses equal protection of the law; see *Richardson v. Belcher*, 404 U.S. 78 30 L.Ed.(2d) 231, 92 S.Ct. 254, (November 22, 1971), where it was stated on page 81 of 404 U.S. 78:

".....while the present case involving as it does a Federal

statute, does not directly implicate a Federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification which meets the test articulated in Dandridge is perforce consistant with the due process requirements of the Fifth Amendment. Cf. Bolling v Sharpe, 347 U.S. 497, 499..."

In U.S. v Stephens, 449 F(2) 103, (9th Cir., 1971), the precise issue before the Court here was considered and resolved favorably to the petitioner's contentions that were made in this very case. In Stephens the accused was convicted of trafficking in marijuana in violation of 26 U.S.C.A. 176a. That statute and 26 U.S.C.A. 7237 (d) at the time of the commission of the offense called for a mandatory minimum jail term of five years upon conviction. At the time of sentencing the newly enacted Drug Control Act was in effect. The sentencing Court sentenced the accused to a five year jail term, the mandatory minimum under the repealed statutes but suspended the sentencing and placed the accused on five years probation. The probation was based on the newly enacted Drug Control Act.

The Government brought a Mandamus proceeding against the Judge to vacate the sentence imposed, and to compel the Judge to impose the mandatory minimum under the repealed statute. The government's application was denied. It was held that the non-abatement requirement of the newly enacted narcotics statute was satisfied because the prosecution of the offender was fully effected. However, the sentencing was distinct from the prosecution. The survival provisions provided for in 1 U.S.C.A. 109 were not germane because the mandatory minimum required by the former narcotics statute, Section 7237 (d) of Title 26 U.S.C. was not encompassed by section 109. On page 106 of 449 F. (2) it was stated in part that:

"We reject the government's argument that section 7237 (d)

should be read as included within section 176a and attached to the penalty provisions of the latter section so as to bring both sections within the ambit section 109. This, in our view, would be extending Section 109 beyond its literal coverage and its purpose to obviate abatement, and for no sound reason."

"The new act reflects the current view that probation should be available for these offenses. Allowing it here permits a salutary tempering of the arbitrariness which otherwise would result from hewing to a cut-off date in transition from old to new law and an approach to even handed dispensation of Justice not otherwise available. We fail to see how the public interest would be served by straining for a statutory construction that would achieve a contrary result."

"Second, we do not regard the grant of probation as a release or extinguishment of penalty. It does not wipe clean the defendant's penal obligation. Rather, it provides means alternative to imprisonment for satisfying it. It is a 'mild and ambulatory punishment,' a 'reforming discipline' and constitutes 'the disciplinary measures which the Court has determined to be necessary for the protection of the public.' Korematsu v United States,..... 319 U.S. at page 435, ..."

In People v Oliver, 1 N.Y. (2) 152, 151 N.Y.S. (2) 367, 134 N.E. (2) 197, (1956) Court of appeals of the State of New York, a fourteen year old offender killed his brother. He was charged under the then existing State statute which provided that a person between the age of 7 and 16 years could be prosecuted for murder as it was a crime punishable with death. After indictment, the accused was committed to a State mental institution because he was found incapable of defending the action. When he was 23 year old he was adiudged sufficiently recovered to stand trial. However, at the time of trial the statute

underlying the crime was amended and existed in its amended state. That statute as amended provided that only a youth fifteen years old could be held responsible for crimes punishable by death or life imprisonment. The accused was convicted under the pre-existing statute. The Court of Appeals of the State of New York, being the Court of Last Resort, held that the judgment of convicting had to be reversed and dismissed the indictment. That Court held that the defendant should have received the benefit of the amended statute even though the crime was committed prior to the amendment. It appears that one of the grounds that was the basis for that decision was the Judicial Policy that is partial to the retroactivity of procedural statutes.

It was stated in People v Oliver, at page 160, of 1 N.Y. 2d, that:

> "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis serve no purpose other than to satisfy a desire for vengence."

The purposes or attainments served by the abolition of the mandatory minimum sentence in the new legislation would appear to be:

1. "providing a consistant method of treatment of all persons accused of (drug) violations."

2. "designing penalties to permit the offender's rehabilitation" and avoiding penalties "in the spirit of retribution".

3. avoiding "the severity, of existing penalties, involving in many instances minimum mandatory sentences (which) have led in many instances to the reluctance on the part of prosecutors to prosecute some violations, where the seriousness of the offense..." House report No. 91-1444, United States Code, Congressional and Administrative News, 91st Congress 1970. pp. 4566, 4570, 4575.

That mitigation of the penalties for certain drug offenses was a primary purpose of the newly enacted legislation is further shown by a statement made by Senator Roman Hruska on the Senate floor the day the Bill was reported out of the Judiciary Committee, December 12, 1969. Senator Hruska, described by Senator Dodd the bills reporters as the guiding proponent of the bill, said:

"Mr. President, we ask today for some dramatic changes in the laws which have stood for many years. A first offense, for example, for simple possession of all controlled dangerous substance has been reduced to a misdemeanor. The decision to make this change was based on the elemental fact that the oppressive penalties presently on the books simply have not worked. They haven't detered drug abuse. In fact, the opposite is true. Drug abuse has increased alarmingly in recent years notwithstanding these severe penalties."
Congressional Record, December 16, 1969 pp. 39242, 39254.

Both the President's Advisory Commission on Narcotics and Drug Abuse (the prettyman commission) appointed by President Kennedy, and the President's Commission on Law Enforcement and Administration of Justice appointed by President Johnson, recommended in reports issued in 1963 and 1967 respectively that the mandatory minimum sentence be abolished for drug offenses, so as to better suit the punishment

to the gravity of the offense and to provide a greater incentive for rehabilitation. The attitude of the present administration is indicated in the following section of the letter from former Secretary of Health, Education and Welfare, Robert H. Finch to Harley O. Staggers, Chairman of the House Committee on Interstate Foreign Commerce:

> "....we strongly support the present version of the administrative proposal contained in S. 3246 as passed unanimously by the Senate on January 28, 1970. Equally important are the provisions of S. 3246 to make penalties more flexible and more appropriately adapted to various offenses." 1970 U.S. Code Congressional and Administrative News (91st Cong.) Vol 3, p 4734.

Reporting on Title III of the new legislation, the House Ways and Means Committee issued this statement:

> "Through the changes in the penalty provisions of existing law, particularly through elimination of mandatory minimum sentences, the committee has sought to arrive at a more realistic, more flexible and thus more effective system of punishment and deterrents of violations of the Federal Narcotics and Dangerous Drug Laws." ibid. at p. 4638.

It would seem therefor, that the sentencing court should have used its authority consistant with the legislative and executive intent expressed above and consistant with the Fifth Amendment and Fourteenth Amendment concepts of due process and equal protection of the law. As noted hereinabove, the Fifth Amendment provision as to due process of law involves equal protection of the law. The sentencing Court's adherence to the five-year minimum mandatory sentence as a basis for sentencing the petitioners herein and expecially those petitioners who receive more than the mandatory minimum, perpetuates an arbitrariness when such a mandatory minimum

has been abolished for all classes of defendants whose crimes were committed subsequent to the effective date of the abolishing legislation. It would seem there is no reason for such discrimination between this latter class of offenders and the class of offenders whose crime was committed before the effective date, but who were not sentenced to after that date. The policies expressed in the new legislation cover both classes of offenders. The instant case is not one where a final judgment is required to be opened by the application of the new penalty provisions. The orderly administration of justice is thus not adversely affected by the new laws application to petitioners and it would seem that the goals of greatest uniformity in the new application of the law are furthered.

In Sobell v United States, 407 F. (2) 180, (2nd Cir., 1969), the issue was whether Sobell would receive credit for times served between arrest and judgment even though he was sentenced in 1960 to a straight maximum term prior to the specific statutory authorization for credit in such cases. In 1960, Congress amended Title 18, Section 3568 of the U.S. Code to provide for time served credit in cases where a mandatory minimum sentence had been imposed, the legislature assuming the Courts had always been giving such credit in all other cases. It was not until 1966 that the Bail Reform Act provided for credit in all cases, but that Act contained within it a servings clause making its provisions applicable to sentences imposed on or after its effective date. Nevertheless, the Court gave Sobell credit for the prior time served holding:

"We recognize that section 6 of the Bail Reform Act provides that newly amended section 3568 is to be applicable only to sentences imposed on or after the effective date, and we are not ruling that the 1966 Act is to be applied retroactively. Rather, we reach the result of giving credit in pre-1960 sentences by considering the policies considered by Congress

in enacting the Bail Reform Act." Sobell v U.S. 407 F. (2) 180, 183

In Staph v United States, 367 F (2) 326, (Court of Appeals, District of Columbia) (1966) it was stated on page 329 that:

> "The Supreme Court has held that it is a denial of equal protection for a Court to perpetuate by its affirmative action a privately created irrational discrimination....A fortiori, it is unconstitutional for a court to effectuate an arbitrary classification by its affirmative action. – action withholding from one class the right accorded to another as an element of the system of justice when the court has the power to prevent that discrimination.... Denial of credit in the context of the juris prudence where others guilty of crimes of the same or greater magnitude automatically receive credit would entail an arbitrary discrimination within the power and hence the duty of the Court to avoid."

Rule 35 of the Rules of Criminal Procedure provides that a timely application can be made by a prisoner to reduce his sentence already imposed. That rule thus allows a reconsideration of a sentence imposed and being served. Consideration applicable to such an application would be the occurrence of events subsequent to the imposition of the sentence, such as, the accused since the sentencing helped the government or acted commendably, and earned a reduction of the sentence already imposed. Yet, under the circumstances attendant to this application, a sentencing Judge would, contrary to his considered discretion be bound by a mandatory minimum. As noted in 20 Catholic University Law Review, 748, (1971) "Sentencing: Disparity, inconsistancy and a New Federal Criminal Code. Narcotic offenses carrying a mandatory minimum are an exception to the general sentencing statutes found in the Federal jurisdiction;" see page 748.

As noted on page 752 of 20 Catholic University Law Review;

"....proponents of more flexibility within the sentencing system readily concede the possibility of greater disparity, but insist that each individual case and its own peculiar circumstances, and that different circumstances required different sentences...."

"There is a wide-spread that some degree of disparity is justifiable. For example the President's Commission on Law Enforcement and Administration of Justice lists three justifications for such a belief:

(1) the need for variations based on relevant differences in offenders; (2).....(3)....., and the need to offer more lenient sentences for defendants assisting public prosecutors."

Realistically, it is not even the sentencing Judge who really determines the minimum. It is the prosecutor. For the prosecutor can select in narcotics cases which particular narcotics statute is to be the basis of a charge. Thus, section 173, 174 of 21 U.S.C. is the basis of the indictment involved in this application. However, the government had the unbridled discretion to prosecute under 526 US 7237(a), which would only carry a minimum penalty of two years..

Thus, by selecting the particular statute, the government deprived many offenders of any choice but to go to trial for even if the offenders were to plead guilty the offender faced a mandatory minimum of five years. To adopt the ruling in Stephens would be a factor in relieving the prevelant calendar congestion. For offenders in pending narcotics prosecutions who have otherwise good records can more hopefully consider waiving a trial and pleading guilty.

As was stated in Downum v U.S. 372 U.S. 734, 102 L. Ed (2) 100, 83 S. Ct. 1033:

"...we resolve any doubt 'in favor of the liberty of a citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion'...."

Opinion per Judge Douglas at page 738 of 372 U.S.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED:

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Pet. Robert James,

HARVEY L. GREENBERG
Attorney for Pet. Anthony Fiotto

HERBERT A. LeGRANGE
Attorney for Petitioners
Peter Hombach & Vincenzo Saccoccio

Dated: New York, N.Y.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Special Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of January one thousand nine hundred and Seventy-two.

Present:

HON. LEONARD P. MOORE,

HON. PAUL R. HAYS,

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

United States of America

Plaintiff-Appellee,

v.

Anthony Fiotto, et al.,

Defendants,

Anthony Fiotto, Robert James,
Peter Hombach, and Vincenzo Saccoccio,

Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

s/
Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 296, 297, 298—September Term, 1971.

(Argued November 18, 1971 Decided January 4, 1972.)

Docket Nos. 71-1651, 71-1689, 71-1690

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY FIOTTO, ROBERT JAMES, PETER HOMBACH, and VINCENZO SACCOCCIO,

Appellants.

Before:

MOORE, HAYS and MULLIGAN,

Circuit Judges.

Appeal from judgments of conviction after a jury trial in the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, for violation of 21 U.S.C. Sections 173, 174 (1964) (repealed 1970) and for conspiracy to violate these sections.

Affirmed.

ARNOLD WALLACH, New York, New York (Lawrence Stern, on the brief), *for Appellant Robert James.*

HERBERT LeGRANGE, New York, New York (Andrew C. Risoli, New York, New York, on the brief), *for Appellants Peter Hombach and Vincenzo Saccoccio.*

HARVEY L. GREEENBERG, Brooklyn, New York *for Appellant Anthony Fiotto.*

CHARLES B. UPDIKE, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Peter F. Rient, Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

Appellants appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York. Appellant Fiotto was convicted of knowingly receiving, concealing, and facilitating the transportation of heroin in violation of 21 U.S.C. Sections 173 and 174 (1964) (repealed 1970). All the appellants were convicted of conspiracy to violate Sections 173 and 174.

The evidence introduced at trial was sufficient to establish that appellants participated in or agreed to a common plan of drug trafficking from December 1966 to May 1970. In December, 1966 Roberto Largan, a Philippine national, arrived in New York and through a friend was introduced to Guillermo

Prillo, also a Philippine national who was living and working in New York City. Largan told Prillo that he has some heroin for sale and asked Prillo if he knew anybody who would be interested in purchasing the narcotic. Prillo told Robert James of Largan's offer to sell, and James eventually introduced Prillo to Anthony Fiotto. The three then met with Largan who offered to sell a kilo of heroin for $25,000, with the three to receive 10% of the proceeds of the sale as a commission for locating a purchaser. When a purchaser was finally located, James telephoned Prillo and told him to notify Largan. By that time, however, Largan had returned to the Philippines. James, Prillo, and Fiotto thereupon met and telephoned Largan in the Philippines. Largen said the sale was still possible and said either he or an agent would bring the heroin to New York. The agent, Benito Lee, arrived in New York in March, 1967 with the heroin, and contacted Prillo who arranged a meeting with Fiotto and James at a restaurant. Peter Hombach joined the four at the restaurant, and James told Prillo and Lee that Hombach's brother-in-law was to be the purchaser. When Hombach saw his brother-in-law's car pass the restaurant, the group left the restaurant. Prillo, James, and Lee got into James's car, and Lee gave the bag, ostensibly containing heroin, to James, who handed it to Hombach who then departed. About an hour later Vincenzo Saccoccio returned with the package and said that the purchaser did not want to consummate the deal because the heroin was apparently synthetic. Lee accepted the return of the package containing the heroin. Several days later James, Prillo, and Lee met Fiotto and Hombach on West End Avenue. Lee gave James and then James gave Hombach the package containing the heroin. Hombach left with the package. Fiotto also left. The others remained in a parked car for about three hours, until Hombach returned with a shopping bag containing $6,000. The bag was given to James, who told Prillo to remove $1,000 as his share. The group then drove to Lee's apartment where they counted the remaining money.

In the spring of 1967 Largan returned to New York with two and one-half kilos of heroin. He met with Prillo, James, and Fiotto, and offered to sell the heroin for $10,000 per kilo. Fiotto and James said that they could arrange the sale. The transaction was completed several days later, with Fiotto and James giving Largan $7,500 for the heroin.

In May, 1968 one of Largan's agents, Mario Sunio, arrived in New York with two kilos of heroin. Prillo obtained a sample which he gave to James. Fiotto and James then met with Sunio. Whether the transaction was completed was not established at trial. During the same month another of Largan's agents, Guillermo Castillo, came to New York twice with two shipments of heroin which Fiotto received directly.

In May, 1970 Castillo was arrested in Seattle while attempting to smuggle two and one-half kilos of heroin into the United States. Castillo agreed to cooperate with federal officials by delivering the heroin while under surveillance. He named Fiotto as the receiver and had Fiotto's phone number in coded form. He telehponed Fiotto, told him that the "souvenirs" (a code word for heroin) had arrived, and arranged a meeting at a coffee shop. The two met, and proceeded to a parking lot where Fiotto directed Castillo to place the bag containing the heroin into a car. Federal agents thereupon arrested Fiotto.

Appellant Fiotto claims that, because there was no evidence to establish that he had possession of the heroin seized when he was arrested, the jury should not have been charged as to the presumption of knowledge of illegal importation pursuant to 21 U.S.C. Section 174 (1964) (repealed 1970). However Castillo testified that Fiotto directed him to put the bag containing the heroin into the car. That testimony was sufficient evidence of constructive control to provide a basis for use of the Section 174 presumption. See *United States v. Hernandez*, 290 F.2d 86,

90 (2 Cir. 1961). Moreover the evidence showed that Fiotto had actual knowledge of the foreign origin and illegal importation of the drugs. He knew Largan and his agents were foreign nationals who made specific trips to the United States to deliver heroin.

Fiotto's claim that the trial judge erred in not calling Castillo to testify at a suppression hearing is frivolous.

Appellants Hombach and Saccoccio urge that the evidence was insufficient to establish their membership in the conspiracy. From Hombach's presence and his activity at the restaurant and during the first aborted exchange, and his handling of the money and the heroin during the sale several days later, the jury was fully justified in concluding that he knowingly entered into an agreement with Fiotto, James, and Lee to dispose of the heroin. The evidence as to Saccoccio's actions in the March transaction – returning the heroin to Prillo, James, and Lee and delivering the message that the narcotic was not of the required quality – was sufficient to allow the jury to find that he had previously agreed with the others to distribute the heroin.

Like Fiotto, Hombach and Saccoccio also claim that there was insufficient evidence of possession of heroin to invoke the statutory presumption of knowledge of illegal importation. Both appellants had possession of the bag containing the heroin at different times during the evening of the first attempted sale. Since Saccoccio relayed the message to Lee that his buyer believed the heroin to be synthetic, he cannot seriously claim that there was no evidence that the bag contained heroin. The clandestine character of the actions of those involved in the aborted sale, the conversation of the participants, the sale three days later of the same bag or package for $6,000, were circumstances from which the jury could infer that the packages which Hombach and Saccoccio had in their possession at various times did in fact contain heroin. See *United States v.*

Agueci, 310 F.2d 817, 828-29 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

Appellant James claims that he was denied a fair trial by the "introduction against him of conspiracies and dealings" in which he played no part. James was shown to be the first person approached by Prillo. From December 1966 to May 1968 he directly participated in the events outlined above. James's substantial activities in furthering the conspiracy amply established his membership.

Appellants were sentenced pursuant to 26 U.S.C. Section 7237 (1964) (repealed 1970). They claim that they should have been sentenced under the provisions of 21 U.S.C. Section 841 (1970), which became effective May 1, 1971.[1]

Section 109 of Title 1 provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty...."

The repealing act did not provide for such extinguishment. The Act of October 27, 1970 Pub. L. No. 91-513, Section 1103(a), 84 Stat. 1201, repealing inter alia 26 U.S.C. Section 7237 (1964) and 21 U.S.C. Sections 173 and 174 (1964), in addition to other sections provides:

"Prosecution for any violation of law occurring prior to ...

---

1. This new sentencing provision does not contain the minimum five year provision which its predecessor, Section 7237(b), did.

[May 1, 1971] shall not be affected by the repeals ... [of former Sections 173, 174 and 7237] ... or abated by reason thereof."

We do not agree with the result reached in *United States v. Stephens* (9th Cir., Docket No. 71-1884 (Sept. 29, 1971)), and hold that under these statutory provisions the imposition of sentence pursuant to the provisions of Section 7237 was correct. See *United States v. Kirby*, 176 F.2d 101, 104 (2d Cir. 1949).

Affirmed.

CONSTITUTIONAL AMENDMENTS

AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

21 U.S.C. § 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, Section 2(b), (d), 35 Stat. 614;

Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Section 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, Section 3, 46 Stat. 586.

21 U.S.C. § 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, Section 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Section 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, Sections 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, Section 105, 70 Stat. 570.

26 U.S.C. §7237 PROCEDURE AND ADMINISTRATION Ch. 75

Section 7237. Violation of laws relating to narcotic drugs and to marihuana

(a) Where no specific penalty is otherwise provided. – Whoever commits an offense, or conspires to commit an offense, described in *part I or part II of subchapter A of chapter 39 for which* no specific penalty is otherwise provided, shall be imprisoned *not less than 2 of more than 10 years and, in addition, may be fined* not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(d) No suspension of sentence; no probation; etc. – Upon conviction –

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

Savings Provision. Section 1103 of Pub. L. 91 – 513 provided that:

"(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 [the first day of the seventh calendar month that begins after Oct. 26, 1970] shall not be affected by the repeals or amendments made by such section or section 1102 [repealing this section and sections 172, 173, 173a, 174, 176 to 184, 184a, 185, 188 to 188n, 191 to 193, 197, 198, 199, 501 to 517 of this title, sections 1401 to 1407 and 3616 of Title 18, sections 4701 to 4771, 7237, 7238, and 7491 of Title 26, sections 529a and 529g of Title 31, and 1421m of Title 48 and amending sections 162 and 198a of this title and sections 4251 of Title 18, 1584 of Title 19, sections 4901, 4905, 6808, 7012, 7103, 7326, 7607, 7609, 7641, 7651, and 7655 of Title 26, section 2901 of Title 28, sections 529d, 529e, and 529f of Title 31, section 304m of Title 40, section 3411 of Title 42, section 239a of Title 46, and section 787 of Title 49], or abated by reason thereof.

"(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 1101 [the first day of the seventh calendar month that begins after Oct. 26, 1970] shall not be affected by the repeals or amendments made by such section or section 1102. . . .

Rule 35 F.R.C.P. Correction or reduction of sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or

judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. As amended Feb. 28, 1966, eff. July 1, 1966.

1 U.S.C. § 109. Repeal of statutes as affecting existing liabilities.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty or liability. July 30, 1947, C. 388 Section 1; 61 Stat. 633.

FOOD AND DRUGS

21 U.S.C. § 960. Prohibited acts A – Unlawful acts

(a) Any person who –

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, airdraft, or vehicle a controlled substance, or

(e) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b) (1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) in the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special

parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

Pub. L. 91-513, Title III, Section 1010, Oct. 27, 1970, 84 Stat. 1290.

Effective Date. Section effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment of Pub. L. 91-513, which was approved on Oct. 27, 1970, see section 1105(a) of Pub. L. 91-513, set out as a note under section 951 of this title.

Legislative History. For legislative history and purpose of Pub. L. 91-513, see 1970 U.S. Code Cong. and Adm. News, p. 4566.

1. Plea of guilty

Defendant's guilty plea to charge of smuggling marijuana was not shown to have been involuntary. Alaway v. U.S. D.C. Cal. 1971, 329 F. Supp. 78.

Defendant who is convicted of smuggling marijuana on plea of guilty may not collaterally attack conviction. Id.

Guilty plea to charge of smuggling marijuana is not rendered invalid because of unconstitutionality of statutory presumption relating to knowledge of illegality of importation, since presumption is not used against defendant in accepting plea. Id.

21 U.S.C. § 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior

conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

APPENDIX D
21A

JUDGMENT OF FIOTTO

DOCKETED AS A JUDGMENT 71, 656
ON JUNE 28, 1971
AT M.

U.S. District Court
Filed
June 18, 1971
S.D. of N.Y.

(SAME TITLE) No. 70 Cr. 913

On this 18th day of June, 1971, came the attorney for the government and the defendant appeared in person and by Harvey Greenberg, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly receiving, concealing, and facilitating the transportation and concealment of heroin after said narcotic drug had been imported and brought into the U.S. contrary to law. (Title 21, U.S. Code, Sections 173 and 174.); conspiracy so to do. (Title 21, U.S. Code, Section 173 and 174). as charged in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on each of counts 1 and 2, to run concurrently with each other.

– AND –

Defendant is FINED $10,000.00 on each of counts 1 and 2. TOTAL FINE of $20,000.00 is to be paid or the defendant is to stand committed until the fine is paid or he is otherwise discharged according to law.

Defendant is continued on present bail fixed in the amount of $40,000.00 and $500,000.00 Unsecured Personal Recognizance Bond pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ John M. Cannella
United States District Judge

s/ John Livingston
Clerk

APPENDIX E
23A

JUDGMENT OF ROBERT JAMES

U.S. District Court
Filed
June 18, 971
S.D. of N.Y.

(SAME TITLE) No. 70 Cr. 913

On this 18th day of June, 1971, came the attorney for the government and the defendant appeared in person and by Arnold Wallach, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly conspiring to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs after said narcotic drugs had been imported and brought into the U.S. contrary to law. (Title 21, U.S. Code, Sections 173 and 174.) as charged in count 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SEVEN (7) YEARS on count 2.

Defendant continued on present bail until he posts bail fixed in the amount of $25,000 plus $350,000 Unsecured Personal Recognizance Bond, pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ John M. Cannella
United States District Judge

s/ John Livingston
Clerk

APPENDIX F
25A

JUDGMENT OF PETER HOMBACH

U.S. District Court
Filed
June 18, 1971
S.D. of N.Y.

(SAME TITLE) No. 70 Cr. 913

On this 18th day of June, 1971, came the attorney for the government and the defendant appeared in person and by Andrew Risoli, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of conspiring to unlawfully, wilfully and knowingly receiving, concealing, and facilitating the transportation and concealment of heroin after said narcotic drug had been imported and brought into the U.S. contrary to law. (Title 21, U.S. Code, Sections 173 and 174.) as charged in count 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on count 2.

Defendant continued on present bail until he posts bail fixed in the amount of $5,000.00 pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ John M. Cannella
United States District Judge

s/ John Livingston
Clerk

APPENDIX G
27A

JUDGMENT OF VINCENZO SACCOCCIO

U.S. District Court
Filed
June 18, 1971
S.D. of N.Y.

(SAME TITLE) No. 70 Cr. 913

On this 18th day of June, 1971, came the attorney for the government and the defendant appeared in person and by Andrew Risoli, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly, conspiring to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs after said narcotic drugs had been imported and brought into the U.S. contrary to law. (Title 21, U.S. Code, Sections 173 and 174.) as charged in count 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on count 2.

Defendant is continued on present bail until he posts bail fixed in the amount of $5,000.00 pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ John M. Cannella
United States District Judge

s/ John Livingston
Clerk

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 21 1972
MICHAEL RODAK, JR., CLERK

No. 71-1114

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY FIOTTO, ROBERT JAMES, PETER HOMBACH, AND VINCENZO SACCOCCIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT E. LINDSAY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1114

ANTHONY FIOTTO, ROBERT JAMES, PETER HOMBACH, AND VINCENZO SACCOCCIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 454 F.2d 252.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on January 4, 1972. On January 18, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including March 4, 1972, and the petition was filed on March 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

463-588—72——1

QUESTION PRESENTED

Whether the mandatory minimum penalties prescribed by narcotics laws that were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970 apply to offenses for which convictions occurred before the effective date of the Act but with respect to which sentence was imposed after that date.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to violate federal narcotics laws, and petitioner Fiotto was convicted of the substantive offense which was the object of the conspiracy (receiving, concealing and facilitating the transportation of heroin hydrochloride, in violation of 21 U.S.C. (1964 ed.) 173 and 174) (Pet. App. D–G; App. pp. 443–444).[1] Fiotto was sentenced to concurrent ten-year terms of imprisonment and fined $20,000; petitioner James was sentenced to seven years' imprisonment, and petitioners Hombach and Saccoccio were each sentenced to five years' imprisonment (Pet. App. D–G; App., pp. 475–476). The court of appeals affirmed (Pet. App. B).

1. The pertinent facts are not disputed here and are set forth fully in the opinion of the court of appeals. Between 1966 and 1970, petitioners participated in a conspiracy to deal in heroin unlawfully imported into the United States. In December 1966,

[1] "Pet. App." refers to the appendices to the petition. "App." refers to the appendix filed by petitioners in the court below, a copy of which we are filing herewith.

Roberto Largan, a Philippine citizen, was introduced to one Guillermo Prillo[2] in New York City (App., p. 14). Largan asked Prillo whether he could locate prospective customers for heroin (App., pp. 18, 20). A few days later Prillo and petitioners Fiotto and James met with Largan and worked out an arrangement (App., pp. 27–31).

In March 1967, Fiotto and James contacted Largan in the Phillipines concerning obtaining some heroin. A short time later one Benito Lee arrived in New York and notified Prillo that he was prepared to deliver one kilo of heroin (App., pp. 35–38). Lee and Prillo met with Fiotto and James and petitioner Hombach, and the heroin was given to Hombach who then departed. About an hour later petitioner Saccoccio returned with the heroin, explaining that the buyer believed that it was synthetic and did not want it (App., pp. 39–51). Lee and Prillo again met with Fiotto, James and Hombach several days later (App., pp. 52, 54). Hombach was given the heroin, left, and returned with $6,000 which he gave James (App., pp. 55–60). During this same period Largan returned to New York and delivered 2½ kilos of heroin to Fiotto and James (App., pp. 62–73).

In May 1968, Guillermo Castillo,[3] a courier for Largan, made two deliveries of heroin to Fiotto (App., pp. 175–188). Some two years later federal officials searched Castillo as he was entering the

[2] Prillo was named as a defendant in the conspiracy count. His case was severed from that of petitioners.

[3] Castillo was also named as a defendant in the conspiracy count, and his case was severed from that of the others.

United States and found that he had 2½ kilos of heroin (App., pp. 188–189). Castillo agreed to cooperate and identified Fiotto as his customer (App., pp. 190–191). He met with and transferred the heroin to Fiotto, after which Fiotto was arrested (App., pp. 192–194).

2. Petitioners were tried during December 1970, and the jury returned the guilty verdicts on December 16, 1970 (App., p. 2A). Sentencing was deferred so that presentence investigations could be completed, and the sentences finally were imposed on June 18, 1971 (App., pp. 3A, 445–476).

The statutes prescribing the substantive offenses involved here (21 U.S.C. (1964 ed.) 173 and 174) provided for a five-year mandatory minimum prison term. Effective May 1, 1971—subsequent to petitioners' convictions but prior to the imposition of sentences—those statutes were repealed and replaced by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Secs. 1101, 1105(a), 84 Stat. 1291, 1295. During the sentencing hearing it was suggested that the new Act applied, and that therefore the trial judge was not limited by the old Act's mandatory minimum in assessing the sentences (App., pp. 461–462, 467, 473). The judge sentenced each petitioner to terms of imprisonment as indicated above without discussing this matter (App., pp. 473–476). In the court of appeals petitioners claimed that they should have been sentenced under the new Act; that court concluded that in the situation here the sentencing provisions of the old statutes applied (Pet. App. B, pp. 8a–9a).

ARGUMENT

Petitioners' sole contention here is that they should have been sentenced under the provisions of the new Act. Petitioners Fiotto and James have no basis for making this contention, however. They were sentenced to prison terms (ten years and seven years, respectively) that exceed the minimum term under the old law (five years), and hence the mandatory minimum did not affect their sentences. Cf. *United States* v. *Bates*, 429 F. 2d 557, 560 (C.A. 9), certiorari denied sub nom. *Isbell* v. *United States*, 400 U.S. 831, and *Green* v. *United States*, 400 U.S. 916.

In any event, the court below correctly rejected this claim. As discussed in our brief in opposition in *Wooden* v. *United States*, No. 71-6085,[4] in the circumstances of this case the repealed provisions remain fully effective for sentencing purposes by reason of the special saving clause of the new Act (Section 1103(a), 84 Stat. 1294) and the general federal saving statute (1 U.S.C. 109). Compare *Duffel* v. *United States*, 221 F. 2d 523 (C.A. D.C.), and *United States* v. *Taylor*, 123 F. Supp. 920 (S.D.N.Y.), affirmed, 227 F. 2d 958 (C.A. 2), certiorari denied, 353 U.S. 961.

Petitioners' claim (Pet. 4–6) that the decision here conflicts with *United States* v. *Stephens*, 449 F. 2d 103 (C.A. 9), does not, we submit, warrant further review. Although the court below expressed disagreement with *Stephens*, there is no conflict. The issue in *Stephens* was whether 26 U.S.C. (1964 ed.) 7237(d), which prohibited probation or suspension of sentence with respect to offenses defined by various narcotics

[4] We are sending a copy of our brief to each petitioner.

statutes that, like Section 7237(d), were repealed by the 1970 Act, still applied to offenses committed prior to the new Act's effective date. The Ninth Circuit concluded that the saving clauses referred to above required only that judgment be entered under the old statutes, and did not have any bearing on post-judgment matters, like probation and suspension. The issue in the present case, on the other hand, concerns the minimum penalty imposed by the old provisions; the court in *Stephens* recognized that this was different from post-judgment matters, and in fact pointed out that the defendant there had been sentenced to "the minimum prescribed" by the old statutes (449 F. 2d at 104).[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT E. LINDSAY,
Attorneys.

APRIL 1972.

[5] We believe that the rationale which supports applying the old penalty provisions for offenses committed prior to the 1970 Act also supports applying the Section 7237(d) bar against probation and suspension in such cases, and thus that *Stephens* was incorrectly decided. The issue, however, does not have continuing significance. The 1970 Act applies to all offenses committed after its effective date (May 1, 1971) and the old statutes control where sentencing occurred prior to that date; the question could arise, therefore, only in those cases which straddle the old statutes and the 1970 Act.

U.S. GOVERNMENT PRINTING OFFICE: 1972